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Corporate Governance Beyond Economics

Elizabeth Pollman*

Forthcoming in THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (Steven Davidoff Solomon & Randall Thomas eds., Univ. of Chicago Press 2019)

INTRODUCTION

U.S. corporate law has an origin story. At the founding of our nation, and through the early nineteenth century, corporations served a quasi-public function. States granted charters to private property holders to fulfill a “public purpose” such as to provide infrastructure or local services such as transportation, banking, and insurance.¹ Profit and its distribution, while part of the expectations of early business corporation organizers, only became a meaningful part of categorizing corporate identity in the latter half of the nineteenth century.² Change occurred rapidly in both business and the law and by the century’s end, state corporate law, as we know it today, had started to take shape.

The quasi-public origin story of corporate law set the foundation for a debate about corporate purpose that has endured for decades, finding its way into legal opinions and serving as the subject for weighty academic discussions. Part of the classic canon of this debate is Adolf Berle and Gardiner Means’ description of the twentieth-century public corporation involving a separation between ownership and control.³ Their vision of a society dominated by management-controlled large corporations, with dispersed “owners of passive property,”⁴ provided a paradigmatic view of the business corporation.⁵ Their observations, moreover, raised the question of corporate accountability—both because of a potential conflict between those who own stock in the

* Professor of Law, Loyola Law School, Los Angeles. Thanks to Sarah Haan, Benjamin Means, James Nelson, Jennifer Rothman, and Verity Winship for helpful conversations and comments, and to our excellent editors Steven Davidoff Solomon, William Savitt, and Randall Thomas.

¹ J.W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 15-17 (1970); *see also* Alfred D. Chandler, *The Visible Hand: The Managerial Revolution in American Business* 28 (1977); Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 954-85 (2014). Notably, what constituted the public good was fiercely contested at the time. Eric Hilt, *Early American Corporations and the State*, in CORPORATIONS AND AMERICAN DEMOCRACY 37, 38 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (“[E]arly American politics was riven by debates over business corporations, and what exactly constituted the ‘common interest.’”).

² Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation*, in CORPORATIONS AND AMERICAN DEMOCRACY 213, 217 (Naomi R. Lamoreaux & William J. Novak, eds., 2017); James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 635-36 (1985).

³ ADOLF A. BERLE, JR., & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

⁴ *Id.* at 356.

⁵ *See* Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121 (2011).

corporation and those who manage it, and because of a concern about whether the public interest would be served by corporations dominating the American economy.

Throughout the twentieth century, corporate law developed with a focus on the allocation of power between shareholders and managers, and the model of the Berle and Means corporation largely persisted. The question of corporate purpose also remained a topic of perennial debate.⁶ Case law reflects times in which the ultimate purpose of business corporations has been tested—ranging, for example, from when Delaware courts developed doctrine for dealing with defensive measures taken by target boards in the takeover context, to the modern redux of the *Ford Motor Company* case involving directors pursuing goals other than shareholder value.⁷ Courts navigated problems such as these with flexible and highly contextual judge-made standards. Notwithstanding significant ambiguity and meaningful dissent,⁸ the dominant viewpoint that has emerged and remained relatively stable over decades is one of understanding corporate purpose and the corporate law framework in predominantly economic terms, and more specifically as focused on shareholder value.⁹

At the beginning of the twenty-first century, evidence of a changing corporate contract could move discourse beyond the classic corporate law canon. This change has come about with a demographic shift among shareholders in public corporations and the rise of institutional shareholders and shareholder activism, topics that have been extensively examined in recent literature.¹⁰ Furthermore, this chapter explores the idea that we are also in an age of increased

⁶ Notable early works include the Berle-Dodd debate: Adolf A. Berle, Jr., *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). For a discussion of the Berle-Dodd debate, see William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99 (2008). More recent works in the corporate purpose literature include, among others: Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003); William W. Bratton, *Framing a Purpose for Corporate Law*, 39 J. CORP. L. 713 (2014).

⁷ See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

⁸ See, e.g., William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894 (1997); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008); KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 127 (2006); LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012).

⁹ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012); Steven M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 574 (2003).

¹⁰ See, e.g., Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1828 n.27 (2011); Myron T. Steele, *Lecture: Continuity and Change in Delaware Corporate Law Jurisprudence*, 20 FORDHAM J. CORP. & FIN. L. 352 (2015); Paul H. Edelman, Randall S.

pressure on corporate law to serve as a mechanism for ordering or pursuing activity that has importance beyond its economic value.

Both state and federal law changes have added to this dynamic. On the federal front, recent U.S. Supreme Court cases have put existing corporate law in a new quasi-constitutional light. In the landmark decisions of *Citizens United v. FEC* and *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court has pointed to state corporate law as the means by which corporations determine their political and religious activity and resolve internal disputes.¹¹ These decisions rely on a view of business corporations that are, in many ways, at odds with longstanding notions from corporate law. In addition, Congress, the SEC, and federal courts have been embroiled in battles about the scope and appropriateness of regulating corporate speech and disclosures on topics such as conflict minerals and political expenditures that are driven principally by humanitarian and democratic goals rather than economic ones. On the state law front, a movement of social entrepreneurs has catalyzed a majority of states to adopt legislation for a new form of business entity—the benefit corporation. The public push for this form of corporate entity harkens back to early American law, permitting businesses to be chartered to pursue a “dual mission” of profits and a social, religious, or environmental goal.¹² The spread of benefit corporation legislation has occurred concurrently but separately from the new federalizing force on corporate law—widening the potential impact of these developments.

We are in the early stages of understanding the significance of these developments, but they hold the potential to dramatically change the corporate landscape, just as the splintering of business corporations from nonprofits did in the nineteenth century. The chapter proceeds by examining these developments and their implications, and anticipates future challenges on the horizon.

RECENT FEDERAL AND STATE DEVELOPMENTS THAT INCREASE THE ROLE OF CORPORATE LAW IN ORDERING NON-ECONOMIC INTERESTS

Business corporations have always been embedded in society and have always involved natural persons who have a full range of interests and values—economic, social, political, religious—that may motivate their actions. Further, some significant corporate governance regulations, which

Thomas, & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1387-92 (2014); INSTITUTIONAL INVESTOR ACTIVISM: HEDGE FUNDS AND PRIVATE EQUITY, ECONOMICS AND REGULATION (William W. Bratton and Joseph A. McCahery eds., 2015); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013); Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299 (2008); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007).

¹¹ *Citizens United v. FEC*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014).

¹² See, e.g., Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269 (2013).

have been in place for decades, implicate this range of motivations and concerns, such as proxy regulation and the shareholder proposal rule, SEC Rule 14a-8.¹³

Notwithstanding this general recognition that business corporations may have both economic and social aspects to their nature,¹⁴ until recently federal regulation of corporate and securities law has focused predominantly on investor protection and the economic interests at stake.¹⁵ And much of the corporate law literature and debate has continued to mine the classic questions of the nineteenth century regarding in whose interests the corporation should be run or has accepted an economic lens through which to theorize and analyze corporate law, treating corporations as economic entities designed to maximize value for their equity investors.¹⁶

Two significant developments have taken place in the past several years that have added complexity to this picture. First, a new federal influence on corporate governance has emerged that has increasingly placed into the spotlight the role of social, political, and religious values in business corporations. Second, the birth of benefit corporations has made visible the choice of some corporate organizers and investors to participate in a different type of corporate contract that expressly requires pursuing values beyond shareholder wealth. This section discusses each development in turn.

First Amendment Battles of Corporations and The Federalizing of Corporate Governance

Over the past forty years, with little exception to the trend, courts have been expanding the First Amendment rights of corporations.¹⁷ This trend has been in bold contrast to the pervasive regulation of corporate and commercial speech throughout U.S. legal history and leading up to this point.¹⁸ The recognition of corporate speech rights started with a focus on nonprofit and media

¹³ See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION*, 93-95 (1995) (discussing the political nature of proxy speech and proxy regulation); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (arguing that the SEC can and should require social and financial disclosure by public companies to promote corporate social transparency).

¹⁴ William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992).

¹⁵ For example, the substantive corporate governance mandates of Sarbanes-Oxley Act of 2002 included provisions that require independent audit committees, executive certifications of financial statements, and restrictions on purchasing nonauditing services from the corporation's auditors and a prohibition on corporate loans to officers. See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).

¹⁶ See, e.g., COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT* (2013); LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012); KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* (2006); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

¹⁷ CIARA TORRES-SPELLISCY, *CORPORATE CITIZEN?: AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE* 6 (2016); John C. Coates IV, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015).

¹⁸ Coates, *supra* note 17, at 223; Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 140.

corporations, but over time those decisions have been used as the foundation for recognizing the rights of business corporations more generally.¹⁹ According to one recent study, “[n]early half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals.”²⁰

Two recent landmark decisions on the political spending rights and the statutory religious liberty rights of business corporations have significantly contributed to this trend: *Citizens United* and *Hobby Lobby*. These decisions, and other battles at the federal level about the political, religious, and social roles of corporations, have increased expectations that internal corporate governance will reconcile these changing rights and responsibilities. Business and constitutional law have thus intersected in ways that raise new issues for the future of corporate law.

In the 2010 case of *Citizens United*, the Supreme Court struck down as unconstitutional a significant campaign finance restriction and precedent that distinguished between the political speech of individuals and corporations.²¹ The petitioner in the case, Citizens United, would have fit within an exception to the campaign finance prohibition at issue given its status as a nonprofit political advocacy corporation, however it had funded the electioneering communication in question with a small portion of funds from for-profit business corporations.²² Instead of ruling narrowly as to the corporation before the Court, it instead ruled broadly as to all corporations, freeing them to spend unlimited general treasury funds on independent political expenditures.

The Court based its ruling on the listeners’ interest in hearing speech as well as on a characterization of corporations as “associations of citizens” and an implication that the First Amendment protection of corporations is equal to that of individuals.²³ The Court did not distinguish between various types of corporations in its reasoning and instead suggested an expressive or dignitary value in corporate speech.²⁴ Further, when rejecting an argument that the government had a compelling interest to regulate the political spending of business corporations in order to protect dissenting shareholders, the Court failed to look closely at the questions of whose voice is expressed through business corporations and what options exist for dissenting shareholders. The Court assumed that corporate law provided sufficient rules for ordering decisions about political spending and that expenditures would be transparent, as technology has enabled timely

¹⁹ Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

²⁰ Coates, *supra* note 17, at 224.

²¹ 558 U.S. 310, 319 (2010). Specifically, the Court struck down a provision of the Bipartisan Campaign Reform Act that prohibited corporations from using general treasury funds to make expenditures for electioneering communications within a certain period of a federal election and it overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

²² *Citizens United*, 558 U.S. at 319, 327-29; *see also* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

²³ *Citizens United*, 558 U.S. at 349, 354.

²⁴ *See id.* at 340-41 (“By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”).

disclosure.²⁵ Thus, according to the Court, “[t]here is . . . little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”²⁶

While to some *Citizens United* represented an incremental loosening of restrictions on corporate political spending that had already begun in the 1970s,²⁷ others saw this as a dramatic move empowering business corporations to take on a new political role. Not all companies engaged in politics or cheered the *Citizens United* decision, but it provided many corporations and donors with what one campaign finance lawyer described as a “psychological green light” and “torrents of money, much of it anonymous” started flowing into electoral races.²⁸ The case became a cultural lightning rod as President Obama criticized it in his 2010 State of the Union address for having “reversed a century of law to open the floodgates for special interests . . . to spend without limit in our elections,” to which Supreme Court Justice Samuel Alito mouthed in response, “It’s not true.”²⁹ Grassroots organizations sprung up to fight for a constitutional amendment overturning *Citizens United*.³⁰ Stories about the distorting impact of corporate political money, particularly in local elections, have continued to garner public attention.³¹

The additional latitude that *Citizens United* provided for business corporations to make political expenditures, and its reasoning based on the “procedures of corporate democracy,” brought

²⁵ *Citizens United*, 558 U.S. at 370 (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are in the pocket of so-called moneyed interests.”) (internal quotation marks omitted).

²⁶ *Id.* at 361-62 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

²⁷ *Bellotti*, 435 U.S. 765; Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 217 (2010) (arguing “that although the decision was a bold stroke in many ways, its impact on the scope of permissible campaign finance regulation is far less substantial than commonly assumed”).

²⁸ Michael Luo, *Money Talks Louder Than Ever in Midterms*, N.Y. TIMES (Oct. 7, 2010), <http://www.nytimes.com/2010/10/08/us/politics/08donate.html?pagewanted=all>. Notably, a significant portion of post-*Citizens United* expenditures have come from wealthy individuals. See Matea Gold & Anu Narayanswamy, *The New Gilded Age: Close to Half of All Super-PAC Money Comes From 50 Donors*, WASH. POST (Apr. 15, 2016), https://www.washingtonpost.com/politics/the-new-gilded-age-close-to-half-of-all-super-pac-money-comes-from-50-donors/2016/04/15/63dc363c-01b4-11e6-9d36-33d198ea26c5_story.html?utm_term=.6c840f9bbfb7; Nicholas Confessore et al., *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html>.

²⁹ Adam Winkler, *Alito Was Rude (But Right)*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/adam-winkler/alito-was-rude-but-right_b_440207.html.

³⁰ See Susanna Kim Ripken, *Corporate First Amendment Rights after Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209 (2011).

³¹ See, e.g., Ciara Torres-Spelliscy, *Why Is Chevron Spending Millions on a Municipal Election?*, BRENNAN CENTER FOR JUSTICE (Oct. 21, 2014), <https://www.brennancenter.org/blog/why-chevron-spending-millions-municipal-election>.

the fire and heat of the public controversy surrounding this decision into the realm of corporate governance. As Professor Larry Ribstein observed, “*Citizens United* shifted the debate over corporate speech from corporations’ power to distort political debate to the corporate governance processes that authorize this speech.”³²

The second recent blockbuster case adding to this federal overlay on corporate law is *Hobby Lobby*. The case arose out of challenges by three closely held corporations to a provision of the Patient Protection and Affordable Care Act of 2010 requiring employers to offer health insurance meeting certain minimum coverage standards, which the Department of Health and Human Services defined to include all FDA-approved contraceptive methods.³³ Families who were unanimous in their religious beliefs against certain contraception owned the stock of the three corporations in the case and argued that the Department of Health regulations violated the religious liberty rights of these corporations under the Religious Freedom Restoration Act (RFRA). The Act prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless that action constitutes the least restrictive means of serving a compelling governmental interest.³⁴

The Court held that business corporations are “persons” capable of the “exercise of religion” within the meaning of RFRA and that the Department of Health regulations violated RFRA as applied to these closely held corporations. The Court reasoned that extending RFRA protection to the corporations “protects the religious liberty of the humans who own and control these companies.”³⁵

In so reasoning, the Court alluded to corporate law as the mechanism for establishing the religious identity of a business corporation. The Court’s language seemed to rely on a notion of shareholder agreement in a closely held corporation, but left unspecified the precise qualifications for RFRA protection. Moreover, the Court acknowledged that “the owners of a company might well have a dispute relating to religion,” but disposed of this concern by noting that “[s]tate corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure.”³⁶

With *Citizens United*’s reference to the “procedures of corporate democracy” and *Hobby Lobby*’s reference to the “ready means” of state corporate law, the Court both expanded the political and religious rights of corporations and leaned on corporate law to provide the rules for corporations to determine whether and how to exercise such rights.³⁷

³² Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1021 (2011).

³³ 134 S. Ct. 2751, 2762 (2014).

³⁴ 42 U.S.C. §2000bb-1(a), (b)(2012). In *Employment Division v. Smith*, the Supreme Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability.’” 494 U.S. 872, 879 (1990). RFRA is a legislative response to *Smith*, with a stated purpose to “restore the compelling interest test” as set forth in pre-*Smith* case law. § 2000bb(a)(4), (b)(1).

³⁵ 134 S. Ct. at 2768.

³⁶ *Id.* at 2775.

³⁷ Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639 (2016).

Other battles at the federal level have also added to the growing focus on the political and social role of corporations. For example, Congress included provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that used corporate disclosure as a tool for broader humanitarian or social goals. The conflict minerals provision, section 1502 of Dodd-Frank, required public companies to investigate their supply chains, disclose the origins of certain minerals used in their products, and to include a description of products not found to be “conflict-free.” Congress explained the provision was aiming at helping to solve “an emergency and humanitarian situation” in the Democratic Republic of Congo where “the exploitation and trade of conflict minerals . . . is helping to finance conflict characterized by extreme levels of violence . . . particularly sexual- and gender-based violence. . . .”³⁸ Shortly after the SEC implemented the law, three trade associations challenged it as unconstitutional compelled speech. The D.C. Circuit agreed with the trade associations, holding that whether the minerals were “conflicted” was a value judgment that the government could not force corporations to render under the First Amendment.³⁹

Putting aside whether one views the conflict minerals rule as inappropriate overstepping by Congress or rather as an appropriate use of disclosure in the public interest, and whether rules such as these may have a short life expectancy in politically turbulent times, the point here is to observe that recent battles have added to the perception that there has been a “corporate takeover of the First Amendment.”⁴⁰ As one observer explained: “Whether it is the corporate challenge to the Seattle minimum wage law where corporations were making a corporate equal protection argument or whether it is GMO labeling in Vermont . . . , corporate actors are using the First Amendment as a sword to fight democratic oversight of their conduct.”⁴¹ These battles increase the task of corporate law to order activity that is not only economic in nature and reduce the ability of government to regulate corporations as it has in the past.

The Birth of Benefit Corporations

In addition to – and arguably in tension with – these federal developments, a separate movement has arisen, reflecting the view that existing state corporate law is inadequate for businesses pursuing a social good besides shareholder wealth maximization. In 2010, the same year that the Supreme Court handed down *Citizens United*, Maryland became the first state in the United States to adopt a benefit corporation statute establishing a new form of business corporation in which the directors must consider the interests of all stakeholders and pursue a public benefit in

³⁸ Dodd-Frank § 1502(a), 124 Stat. 2213.

³⁹ Nat’l Ass’n of Mfrs. v. SEC, 748 F.3d 359, 371 (D.C. Cir. 2014); Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (“[W]e continue to agree with NAM that [r]equiring a company to publicly condemn itself is undoubtedly a more effective way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so.”) (internal quotation marks and footnote omitted).

⁴⁰ Coates, *supra* note 17.

⁴¹ TORRES-PELLISCY, *supra* note 17, at 76-77 (quoting Interview with Elizabeth Kennedy, Counsel, Demos (Aug. 12, 2015)).

addition to profits.⁴² Over thirty states, including Delaware, currently have benefit corporation statutes.⁴³ Although the numbers are still modest, several thousand businesses have used these statutes, hundreds of millions of dollars of venture capital has been invested in benefit corporations, and several public corporations have subsidiaries that are benefit corporations.⁴⁴

The catalyst for the benefit corporation movement is B Lab, a non-profit started by social entrepreneurs with the belief that traditional corporate law does not provide a governance model that is fully consistent with operating business in a sustainable manner in the interests of all stakeholders. While some commentators have argued that a different form of corporation was unnecessary because traditional “C” corporations could be customized and corporate law gives directors discretion to consider stakeholder interests, particularly in states with constituency statutes,⁴⁵ the B Lab founders believed that it was necessary to create a new form of entity in order to lock into a company’s DNA “mission-aligned governance” and to credibly prove to stakeholders that it was a firm commitment.⁴⁶

The key concepts of benefit corporation legislation include the requirements that the corporate charter must contain a clearly articulated public or social purpose, the directors must consider stakeholder interests beyond shareholder profit, and the company must report on its efforts to promote its purpose. Many states have adopted benefit corporation statutes based on the B Lab model legislation, but some variation exists, for example with regard to the pursuit of a public or social benefit. Some states require the pursuit of a “general public benefit,” which is defined as “a material positive impact on society and the environment, taken as a whole,” whereas others leave it to the corporation to define its mission, and still others require or allow the corporation to identify a

⁴² Frederick H. Alexander, *The Capital Markets and Benefit Corporations*, AMERICAN BAR ASS’N (July 5, 2016), http://www.americanbar.org/publications/blt/2016/07/05_alexander.html; Brett McDonnell, *Benefit Corporations and Strategic Action Fields (or the Existential Failing of Delaware)*, 39 SEATTLE U. L. REV. 263, 280 (2016) (“These statutes sit atop the basic business corporation statute. That is, benefit corporations *are* business corporations, subject to all of the rules of the business corporation statute, except insofar as the benefit corporation statute provides different or additional rules.”).

⁴³ Alexander, *supra* note 42; *State by State Status of Legislation*, B LAB, available at <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Oct. 4, 2016).

⁴⁴ Alexander, *supra* note 42; Leo E. Strine, Jr., *Making It Easier for Directors to “Do the Right Thing”*, 4 HARV. BUS. L. REV. 235, 253 (2014); see also Jesse Finfrock & Eric Talley, *Social Entrepreneurship and Uncorporations*, 2014 U. ILL. L. REV. 1867, 1867 (arguing that using LLC uptake as a comparative historical benchmark suggests “that there is hope that these new social enterprise corporations will see an increasing rate of uptake in the future”).

⁴⁵ See, e.g., Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 405-06 (2013) (“Delaware’s new benefit corporation law laudably advances the goal of institutional pluralism, but does so at the ironic risk of reinforcing a belief that business corporations themselves are legally permitted only to maximize profits.”).

⁴⁶ Alexander, *supra* note 42; Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1036 (2013).

“specific social benefit.”⁴⁷ Delaware, for example, defines “public benefit” to mean “a positive effect (or reduction of negative effects) on 1 or more categories . . . including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature.”⁴⁸

Notwithstanding this variation, all benefit corporation statutes do not just allow the pursuit of social goals other than profit maximization, but in fact *require* them to do so and this requirement is backed up by certain accountability and transparency mechanisms.⁴⁹ The ultimate goal of this movement appears to extend not only to spreading the benefit corporation form but also the ideals it embodies, of pursuing goals beyond economic value to shareholders, and the hope this will be embraced by business more broadly.⁵⁰

RESPONSES, CHALLENGES, AND FUTURE IMPLICATIONS

The above discussion argues that the expanded federal rights of corporations and the birth of benefit corporations puts new pressure on corporate law to serve as an ordering mechanism for interests and values beyond economics. Because the federal developments are not cabined within the benefit corporation movement, we have a broader push towards a reshaping of rights and roles of corporations.

This section examines some of the issues these developments have posed and identifies potential controversies that may still lie ahead. In particular, the below discussion considers the possibility that reform that is responsive to the changing rights and roles of business corporations will be slow and difficult to achieve, and the history of corporate rights suggests that corporations will likely push for further expansions of rights.

Revising the Corporate Contract

Citizens United and *Hobby Lobby* raised a host of important questions in their wake. Should the same corporate law rules apply for issues concerning economic and non-economic values? What must a corporation do to be recognized as having a social or religious identity? Are changes to voting rules in order such as super-majority protections or other means of protecting dissenting shareholders in a new age of corporate activity? Should non-shareholder participants in the corporation have a greater voice in governance?

Despite this substantial list of questions and an abundance of attempts at reform, the years immediately following *Citizens United* and *Hobby Lobby* have produced relatively little change to corporate law or governance. The struggles to bring about real transformation in response to these landmark decisions have illuminated the political infeasibility and practical difficulty of broad-based

⁴⁷ Michael Vargas, *The Next Stage of Social Entrepreneurship: Benefit Corporations and the Companies Using this Innovative Corporate Form*, AMERICAN BAR ASS’N (July 5, 2016), http://www.americanbar.org/publications/blt/2016/07/01_vargas.html.

⁴⁸ Del. Code Ann. Tit. 8 § 362(b) (2013).

⁴⁹ McDonnell, *supra* note 42, at 280.

⁵⁰ Strine, *Making It Easier*, *supra* note 44, at 253.

corporate change and the fact that consensus is lacking about how to even understand existing corporate law.

One of the pressing issues post-*Citizens United* has been whether federal legislation, changes to state corporate law, or private ordering of corporations might bring governance in line with the “corporate democracy” and transparency to shareholders that the opinion had invoked in its reasoning. Although public disapproval of *Citizens United* was high,⁵¹ reform efforts stalled in Congress. For example, a proposal by several U.S. senators to amend the Constitution failed as did multiple attempts at passing the Shareholder Protection Act, which would have required public companies to disclose and obtain shareholder approval of corporate political spending and to have board oversight of such spending.⁵² A few states succeeded in adopting modest measures that require corporations to get board approval of corporate political expenditures,⁵³ but many more states considered bills requiring disclosure or shareholder approval of corporate political spending that have failed to become law.⁵⁴

In addition, attempts to spur the SEC to mandate public companies to disclose political expenditures have so far failed. Record-breaking support for a SEC mandate has continued to grow, with a petition for public company political spending disclosure amassing more than a million public comments, including the support of many institutional investors and politicians.⁵⁵ However, under significant political pressure, then-SEC Chair Mary Jo White removed the request for rulemaking from the agency’s agenda in 2013 and Congress buried a policy rider in the omnibus budget agreement that prevented the SEC from using fiscal year 2016 funds to finalize a rule on the topic.⁵⁶ Whether one agrees or disagrees on the merits with this result, it is notable that Justice Anthony Kennedy, the author of the majority opinion in *Citizens United*, has expressed concern that corporate disclosure of political spending is “not working the way it should.”⁵⁷

⁵¹ For example, in a *Washington Post-ABC News* poll, eight in ten poll respondents opposed the decision, with 65% “strongly” opposed. Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

⁵² James R. Copland & Margaret M. O’Keefe, *Political Spending and Lobbying*, PROXY MONITOR (2016), <http://www.proxymonitor.org/Forms/2016Finding3.aspx#notes>. For an argument that political speech decisions are different from ordinary business decisions and necessitate special corporate law rules, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010).

⁵³ La. Rev. Stat. Ann. 18:1505.2(F); Mo. Ann. Stat. 130.029; IA Stat. 68A.404(2); see also *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013) (reviewing Iowa’s campaign finance law).

⁵⁴ TORRES-SPELLISCY, *supra* note 17, at 279-80.

⁵⁵ Lucian A. Bebchuk & Robert J. Jackson, Jr., *Hindering the S.E.C. From Shining a Light on Political Spending*, N.Y. TIMES (Dec. 21, 2015), <http://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html>.

⁵⁶ *Id.*

⁵⁷ *Id.*

Meanwhile, shareholders have endeavored to get political spending and disclosure rules through firm-by-firm private ordering and have had some limited and spotty success. Shareholder proposals on corporate political spending and disclosure increased significantly after *Citizens United*—hundreds of such proposals have been introduced in the past several years and a small handful have received majority shareholder support over board opposition.⁵⁸ Shareholder proposals are often negotiated behind the scenes, however, and thus much of what is known about public companies’ political expenditures comes from voluntary disclosures or disclosures pursuant to privately-negotiated agreements.⁵⁹ These private mechanisms have therefore brought about some increase in corporate political spending disclosure, but the broader picture remains that there have been no substantive changes to “the procedures of corporate democracy” that the Supreme Court blindly relied upon in *Citizens United*. Furthermore, shareholder proposals typically fail or proceed through opaque processes and the information available to shareholders (and citizens) regarding corporate political spending remains incomplete.

Whereas the aftermath of *Citizens United* reflects the political infeasibility and practical difficulty of broad-based corporate change, the aftermath of *Hobby Lobby* reveals that consensus is lacking about how to even understand existing corporate law. After the Court handed down *Hobby Lobby*, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services, published a proposed rule seeking comments on defining which for-profit corporations are eligible to claim religious exemptions under the decision. The Court itself had pointed to the term “closely held corporation” and state corporate law to provide guidance about how corporations may choose a religious identity. Comments flowed in revealing that corporate law experts disagreed about how to best interpret the Court’s language and reconcile it with state corporate law—belying the Court’s claim that state corporate law provides a “ready means” for resolving disputes that may arise regarding which corporations have a religious identity.⁶⁰ For purposes of implementing the *Hobby Lobby* decision as to corporations claiming a religious accommodation, the Departments issued a final rule that defined eligible closely held corporations.⁶¹ Subsequent courts have begun to grapple with whether and how to apply *Hobby Lobby*’s ruling and

⁵⁸ Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 294 n.122 (2016).

⁵⁹ *Id.* at 262, 264-66.

⁶⁰ See Lyman Johnson et al., Comments on the HHS’ Flawed Post-Hobby Lobby Rules (UCLA School of Law Research Paper No. 14-18, 2014), <http://ssrn.com/abstract=2512860>; Robert P. Bartlett III et al., Comment on the Definition of “Eligible Organization” (Oct. 8, 2014), <http://ssrn.com/abstract=2507305> (authored by U.C. Berkeley Corporate Law Professors); Katherine Franke et al., Comment on the Definition of “Eligible Organization” (Oct. 21, 2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_comments_on_proposed_regs_corp_law_profs_for_submission.pdf (authored by the Columbia Conscience Project and Corporate Law Professors).

⁶¹ *Administration Issues Final Rules on Coverage of Certain Recommended Preventive Services Without Cost Sharing*, HHS.GOV (July 10, 2015), <http://www.hhs.gov/about/news/2015/07/10/administration-issues-final-rules-on-coverage-of-certain-recommended-preventive-services-without-cost-sharing.html>.

reasoning in different contexts beyond allowing business corporations to opt out of the contraception requirements under the Affordable Care Act.⁶²

In sum, efforts to respond to *Citizens United* and *Hobby Lobby* have been limited in their effect. The Supreme Court can move relatively quickly in recasting corporate roles and rights, but responsive legislative change and private ordering are often difficult to achieve and narrower or piecemeal in scope. One of the boldest changes in corporate law in recent years has been the benefit corporation movement itself—yet it provides the choice of a separate corporate form rather than clarifying the purpose of traditional corporations or moving them towards greater transparency or improved governance.⁶³ Significant issues remain to be worked out in coming years in reconciling the increased social, political, and religious activity of business corporations.

Controversies on the Horizon

As state and federal law reshapes the rights and roles of business corporations, new controversies come into closer view. The continued expansion of the constitutional and statutory rights of business corporations, as we saw in *Citizens United* and *Hobby Lobby*, portends potential future challenges concerning speech and association.

First, the expanded political speech rights of corporations call into question the boundaries with other areas such as commercial speech and the applicability of concerns about compelled speech with regard to business corporations. Although the Supreme Court has recognized a limited measure of protection for commercial speech since 1976 on the basis of the rights of listeners to be informed,⁶⁴ the Court and lower federal courts may have already lost sight of this limited basis for protection.

The recent D.C. Circuit conflict minerals disclosure case, discussed above, illustrates this point. There, the court found a First Amendment right against compelled speech by assuming that a value exists in protecting the autonomy of corporate speakers rather than recognizing that commercial speech is only constitutionally valuable to the extent that it provides factual information to an audience.⁶⁵ As Robert Post has explained, “Regulations that force a speaker to disgorge *more* information to an audience do not contradict the constitutional purpose of commercial speech doctrine. They may even enhance it.”⁶⁶ Notably, the conflict minerals case is not an outlier—there are a growing number of circuit court decisions that have used the doctrine of “compelled

⁶² See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 863 (E.D. Mich. 2016) (citing *Hobby Lobby* in holding that a closely held corporation that terminated a transgender employee for sex-based considerations was eligible to claim RFRA protection from Title VII).

⁶³ See Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 127 (2016) (arguing that “[i]n the absence of additional action, traditional for-profit corporations see little, if any, improvement from the addition of Benefit Corporations”).

⁶⁴ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980); see also ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 74 (2014) (“[T]he speech is protected only because it promotes informed public decision making.”).

⁶⁵ Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 874-79 (2015).

⁶⁶ *Id.* at 877; see also Shanor, *supra* note 18, at 151-52.

commercial speech” to strike down laws mandating commercial disclosures.⁶⁷ With changing views of corporations and the values they pursue, courts could increasingly see commercial speakers as having autonomy interests to protect.

Furthermore, in a 2011 case, *Sorrell v. IMS Health Inc.*, the Supreme Court applied “heightened” scrutiny to a commercial regulation, striking down a Vermont law that prohibited the sale, disclosure, and use of pharmacy records that reveal individual doctors’ prescribing practices.⁶⁸ The majority opinion noted that “[c]ommercial speech is no exception” to the principle that “[t]he First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.”⁶⁹ Justice Breyer understood the majority’s ruling as a troubling turn and warned in his dissent: “At best the Court opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.”⁷⁰

This line of cases may presage future First Amendment challenges to securities regulation and other longstanding pillars of corporate regulation. Scholars foretold this possibility decades ago,⁷¹ and the law has moved closer in this direction. In a 2015 case, *Reed v. Town of Gilbert*, the Supreme Court cited *Sorrell* for the expansive proposition that “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”⁷² As Supreme Court commentator Adam Liptak wryly observed: “Securities regulation is a topic.”⁷³ Indeed, taken literally or to its logical conclusion, the Supreme Court’s language suggests a view of all mandatory commercial disclosures as content-based restrictions that would be subject to searching constitutional review.⁷⁴

Another area that is ripe for new controversy in light of recent corporate developments is the Supreme Court’s freedom of association doctrine, which has long recognized that expressive associations may claim institutional autonomy with respect to membership and internal governance.⁷⁵ Although an explicit dichotomy has not been drawn, commercial associations have

⁶⁷ See, e.g., *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Authentic Beverages Co. v. Tex. Alcoholic Beverage Comm’n*, 835 F. Supp. 2d 227 (W.D. Tex. 2011).

⁶⁸ 564 U.S. 552 (2011).

⁶⁹ *Id.* at 566 (internal quotation marks omitted).

⁷⁰ *Id.* at 602-03 (Breyer, J., dissenting).

⁷¹ See, e.g., BUTLER & RIBSTEIN, *supra* note 13, at 79-106.

⁷² 135 S. Ct. 2218, 2227 (2015).

⁷³ Adam Liptak, *Court’s Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html>; see also TORRES-SPELLISCY, *supra* note 17, at 97.

⁷⁴ Other related issues include defining the boundaries of what constitutes commercial speech and the tests and levels of scrutiny applied to laws that restrict vs. compel commercial speech. Compare *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980), with *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

⁷⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate

been understood in the past as entitled only to minimal constitutional protection from regulation.⁷⁶ Justice Antonin Scalia, for example, once explained: “The robust First Amendment freedom to associate belongs only to groups ‘engage[d] in ‘expressive association . . .’ The Campbell Soup Company does not exist to promote a message, and ‘there is only minimal constitutional protection of the freedom of *commercial* association.’”⁷⁷

Will this distinction hold in coming years? Justice Scalia referred to Campbell Soup Company simply as shorthand for what he seemed to take as a basic understanding that ordinary commercial associations are not formed to engage in First Amendment activities. But recent times have seen the developments discussed in this chapter, and we can observe that even Campbell Soup, for example, has acquired Plum Organics, a benefit corporation that “was founded by a group of parents on a mission to give the very best food to our little ones.”⁷⁸

Scholars have long criticized the distinction between expressive and commercial associations, arguing that it is unprincipled or that at least some commercial businesses deserve the same level of constitutional protection as expressive associations.⁷⁹ Their arguments are strengthened by the developments discussed in this chapter pushing corporate governance toward focusing on non-economic values and the increasingly politicized consumer and investor markets. Benefit corporations have explicit social, religious, and environmental missions. Corporations are increasingly taking political and religious stances in the marketplace—from small businesses claiming religious liberty protections to discriminate in providing their services to major corporations pushing back against state religious liberty and anti-LGBTQ+ laws. Indeed, as of this writing, a case raising issues about state anti-discrimination law and the First Amendment is pending before the Supreme Court.⁸⁰

As these trends continue, categorizing corporate activity may prove difficult. Professor Ronald Colombo posed the question: “Consider decisions to grant or deny employee benefits to

with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) (“An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.”).

⁷⁶ James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 462 (2015).

⁷⁷ *Wash. St. Grange v. Wash. St. Repub. Party*, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting).

⁷⁸ Press Release, *Campbell to Acquire Plum Organics, A Leading Premium, Organic Kids Nutrition Company*, CAMPBELL SOUP CO. (May. 23, 2013), <http://www.campbellsoupcompany.com/newsroom/press-releases/campbell-to-acquire-plum-organics-a-leading-premium-organic-kids-nutrition-company/>.

⁷⁹ See, e.g., RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* (2014); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000); John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435 (2012); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767 (2001); Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012).

⁸⁰ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 2017 WL 2722428 (June 26, 2017), — U.S. — (2018); see also Petitioners’ Petition for A Writ of Certiorari, *available at* <http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf> (“Petitioner Masterpiece Cakeshop, Ltd., is a small Colorado corporation owned by Petitioner Jack Phillips, an individual and citizen of Colorado, and his wife”).

unmarried domestic partners, or to purchase parts and supplies from foreign companies known to violate domestic standards regarding child labor. Could not these choices, however they are made, be deemed to some ‘socially responsible,’ to others ‘political,’ and to still others ‘strictly business’?”⁸¹

Yet, a great deal is at stake in these coming controversies. If courts “ignore[] the reality that nonhuman corporations are fundamentally distinct from their ultimate human investors,”⁸² the rights of business corporations will expand and the sphere in which government can act will narrow. Indeed, “[i]f there were a First Amendment right to associate to form ordinary commercial corporations, . . . every aspect of state corporate law would be subject to strict First Amendment scrutiny.”⁸³ Paradoxically, while some corporations echo earlier times in American history when corporations were understood as pursuing private and public values, states and the federal government may have a smaller sphere in which they can regulate corporations than ever before.

CONCLUSION

Corporate governance, the “corporation’s operating system,” is complex and subject to continual change.⁸⁴ This chapter gathers some of the threads of recent legal change at the federal and state levels that challenge a view of corporate law as simply ordering the private economic interests and relations of shareholders and managers.

In the federal courts, First Amendment battles have increasingly placed into the spotlight the role of social, political, and religious values in business corporations. In particular, the Supreme Court’s decisions in *Citizens United* and *Hobby Lobby* put weight on state corporate law to provide decision-making rules for corporate political spending and religious identity. Other federal court decisions also suggest further controversy ahead with respect to corporate commercial speech and freedom of association. In a separate development, a social entrepreneurship movement has spread across the states, establishing the benefit corporation as a new form of business entity that expressly requires the pursuit of both profits and another purpose in the social, religious, or environmental realm.

⁸¹ COLOMBO, *supra* note 79, at 100-01. See also, e.g., Virginia Harper Ho, “Enlightened Shareholder Value”: Corporate Governance Beyond the Shareholder-Stakeholder Divide, 36 J. CORP. L. 59 (2010) (discussing the “enlightened shareholder value” approach which views the effect of corporate operations on the environment, employees, and other stakeholders as key to long-term financial performance and risk management). For example, in its 2015 Global Governance Principles, public pension fund CalPERS included “sustainability” as one of its “core principles” for long-term value creation and described it as including concern for governance, the environment, and social issues pertaining to human capital such as fair labor practices and workplace and board diversity. It further listed “corporate social responsibility – eliminating human rights violations” as another of its “core principles.” See CalPERS Global Governance Principles, Mar. 16, 2016, available at <https://www.calpers.ca.gov/docs/forms-publications/global-principles-corporate-governance.pdf>.

⁸² Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 386 (2015).

⁸³ POST, *supra* note 64, at 70.

⁸⁴ Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (forthcoming), available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2819128.

A difficult question at the heart of these developments is whether there is, or could ever be, a clear and meaningful distinction between the economic and the non-economic aspects of the business corporation or if that distinction will always be hard to draw or even illusory. But regardless of whether one sees these developments as increasing the role of business corporations and corporate law in ordering activity that is fundamentally non-economic in nature or rather that simply has dimensions beyond the economic, these are important trends to pull together and examine.

As this chapter points out, understanding business corporations as institutions embedded in society, as sites of both public and private values, is not new but rather deeply rooted in history. But what is new is a willingness to translate this understanding into expansions of rights for business corporations. Courts have allowed the logic of earlier decisions that set limits on the rights of corporations to fade and have embraced previously eschewed notions of autonomy and dignity interests in business corporations. There is a Pandora's Box-like quality to this jurisprudence, as Justice Breyer observed, as it may open the door to future challenges and lines of reasoning that prove harmful. Together with the arrival of benefit corporations, these developments suggest that participants in business corporations face a changing corporate contract and will need to do more work to decide how they should operate, what activities they should engage in, and what differences in purposes and rights these varied business corporations will have.